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October 16, 2003

Hon. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals II
445 12th Street, SW
Washington, D.C. 20554

RE: Comments of the New York State Department of Public Service in the Matter of the Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers - Notice of Proposed Rulemaking; CC Docket Nos. 01-338, 96-98, and 98-147; FCC 03-36.

Dear Secretary Dortch:

The New York State Department of Public Service (NYDPS) hereby responds to the Federal Communications Commission's (Commission) Notice of Proposed Rulemaking (NPRM) released on August 21, 2003 and published in the Federal Register on September 2, 2003.¹ The NPRM generally seeks comment on whether the Commission should alter its interpretation of 47 USC §252(i), which requires incumbent local exchange carriers (ILECs) to make the terms of approved interconnection agreements available to all competitive local exchange carriers.²

The comment date was extended to October 16, 2003.

47 USC §252(i) states: "A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

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The Commission's current rule allows carriers to opt into each distinct term and condition in an approved interconnection agreement subject to certain conditions ("pick-and-choose").³ The FCC now opines that the current rule provides little opportunity for creativity because ILECs seldom make significant concessions in return for a trade-off because they fear another CLEC may "pick" one benefit of a negotiated interconnection agreement without "choosing" all of the related concessions. Despite the give-and-take that Congress may have envisioned, the result is that ILECs tend to offer standardized agreements that may not meet the unique needs of a CLEC.

Here, the Commission specifically asks for comment on the following proposal and queries whether it would address the criticisms of the current rule. If the incumbent carrier does not offer individual items (elements, services, interconnection, etc.) on a stand-alone basis through an approved Statement of Generally Available Terms and Conditions (SGAT), the current rule would apply to all approved interconnection agreements between the ILEC and CLECs. However, if the ILEC has an approved SGAT, the pick-and-choose rule would apply solely to the SGAT. In instances where an SGAT is offered and an interconnection agreement is entered into, such agreement would be subject to an "all-or-nothing rule." This would require carriers to adopt the interconnection agreement in its entirety.

The NYDPS supports this proposal. The offering of individual items under standard terms and conditions through a tariff or SGAT should preserve competing carriers' access to all such items on a reasonable basis. Concurrently applying an all-or-nothing rule to the terms of approved agreements should provide negotiating parties greater latitude to craft creative agreements that might expand the range of available services and options since the CLEC and ILEC negotiate with the knowledge that third-party CLECs cannot "pick" certain benefits without "choosing" the concomitant concessions.

The Commission also incorporated in the NPRM the petition filed by MPower Communications (Mpower).⁴ In its petition, MPower proposes the use of a voluntarily-negotiated, wholesale

³ 47 CFR §51.809.

⁴ MPower Communications Corp. Petition for Forbearance and Rulemaking, CC Docket No. 01-117 (filed May 25, 2001) (MPower Petition).

contract between an incumbent local exchange carrier (ILEC) and a competitive local exchange carrier (CLEC). As an alternative to the pick-and-choose rule, MPower is advocating a wholesale contract containing provisions constituting a "packaged deal" that includes "terms and conditions for bulk purchases and concomitant quality of services guarantees."⁵ Since CLECS would have to opt into entire contracts or "packages," MPower requests that the FCC forbear from applying the pick-and-choose rules and from requiring state commission approval of interconnection agreements. 47 USC §252(e).⁶

The NYDPS believes that the authority preserved to states in §252(e) is not subject to forbearance. The New York Public Service Commission (NYPSC) has established requirements for migration of customers to ensure that carriers have appropriate procedures in place, including provision of adequate notice in the event of termination of service, so that customers can change local service carriers efficiently. The Commission is also considering the need for other wholesale protections to prevent abrupt termination of local service. These protections are provided pursuant to state law and cannot be diminished through a petition for forbearance.

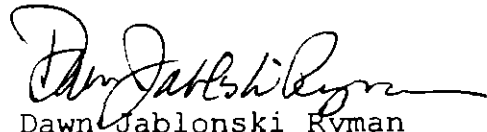
MPower Petition, p.7.

⁵ 47 USC §252(e)(1) states "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies." Sections 252(e)(2) indicates the grounds for rejection; §252(e)(3) permits the states to enforce other requirements of state law; §252(e)(4) provides the schedule in which the state commission is to act; §252(e)(5) states that the Commission will act if the state commission does not; and §252(e)(6) indicates that review of state commission decisions will only be addressed in federal district court.

Further, the NYDPS believes that the three-prong forbearance test set forth in 47 USC §160(a) has not been met.⁷ Section 252(e)(2)(A)(ii) permits a state commission to reject a negotiated agreement if the implementation of the agreement is not consistent with the public interest, convenience or necessity. There is a risk that precluding state commissions from approving interconnection agreements could permit ILECs to include provisions that are discriminatory or unfair to other carriers or consumers. Absent another approval process for interconnection agreements, which was not proposed by MPower here, there would be no mechanism to ensure that negotiated agreements were consistent with the public interest.

For these reasons, the NYDPS supports the Commission's proposal but requests that the Commission reject MPower's petition insofar as it requests that the Commission forbear from applying §252(e).

Respectfully submitted,



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⁷ 47 USC §160(a) requires that the Commission determine that (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.